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No. 04-

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES,
Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the definition of "cable service" — the one-way transmission of information that a cable operator makes available to all subscribers generally and any subscriber interaction required for the selection or use of that information, 47 U.S.C. §§ 522(6) & 522(14) — includes cable modem service.

2. Whether the Ninth Circuit erred when it relied on *stare decisis* to affirm, without discussion, the Federal Communications Commission's determination that cable modem service is not within the meaning of "cable service" as defined in 47 U.S.C. § 522(6).

PARTIES TO THE PROCEEDING

Cross-Petitioners National League of Cities ("NLC"), National Association of Telecommunications Officers and Advisors ("NATOA"), United States Conference of Mayors ("USCM"), National Association of Counties ("NACo"), and Texas Coalition of Cities for Utilities Issues ("TCCFUI") (collectively, "Cross-Petitioners"), were petitioners in the consolidated court of appeal proceedings below.

Cross-respondents Federal Communications Commission and the United States of America were respondents in the court of appeal below.

Cross-respondents who were petitioners in the court of appeals below are: Brand X Internet LLC, Earthlink, Inc., Verizon Internet Solutions d/b/a/ Verizon.net, Verizon Telephone Companies, Consumer Federation of America, Consumers Union, Center for Digital Democracy, People of the State of California, ex rel. Bill Lockyer, the Public Utilities Commission of the State of California, Buckingham Township, Conestoga Township, East Hempfield, Township, Martic Township, and Providence Township, Pennsylvania.

Cross-respondents who were intervenors in the court of appeals below are: National Cable & Telecommunications Association, SBC Communications Inc., World-Com, Inc., Cox Communications, Inc., AT&T Corp., Competitive Telecommunications Association, Vermont Public Service Board, the Information Technology Association of America, Focal Communications Corporation, Charter Communications, Inc., Vermont Public Service Board, the State of Vermont, the Vermont Department of Public Service, Utility, Cable & Telecommunications Committee of the City Council of New Orleans, Association of Communications

Enterprises, Time Warner, Inc., Time Warner Cable, the City and County of San Francisco, BellSouth Corporation, BellSouth Telecommunications, Inc.; Alliance for Community Media; American Public Works Association; City of Alexandria, Virginia; City of Austin, Texas; City of Charlotte and Mecklenberg County, North Carolina; City of Chicago, Illinois; City of Concord, California; City and County of Denver, Colorado; City of Dubuque, Iowa; City of Indianapolis, Indiana; City of Irvine, California; City of Kansas City, Missouri; City of Los Angeles, California; City of Olympia, Washington; City of Plano, Texas; City of Rockville, Maryland; City of San Antonio; City of St. Paul, Minnesota; City of Tacoma, Washington; City of Takoma Park, Maryland; City of Tucson, Arizona; City of Virginia Beach, Virginia; Community Programming Board of Forest Park, Greenhills and Springfield Township, Ohio; Greater Metro Telecommunications Commission, Colorado; Illinois Association of Telecommunications Officers and Advisors; International Municipal Lawyer Association; Metropolitan Area Communications Commission, Oregon; Metropolitan Government of Nashville and Davidson County; Miami Valley Cable Council, Ohio; Minnesota Association of Communication Telecommunications Administrators; Montgomery County, Maryland; Mount Hood Cable Regulatory Commission, Oregon; Piedmont Triad Council of Governments, North Carolina; Texas Association of Telecommunications Officers and Advisors (TATOA); Village of Buffalo Grove, Illinois; Village of Hoffman Estates, Illinois; Village of Oak Park, Illinois; Village of Skokie, Illinois.

Pursuant to Rule 29.6 of this Court's rules, Cross-Petitioners state as follows:

NLC, NATOA, USCM, NACo and TCCFUI are non-profit associations, and no publicly held company owns an interest of 10% or more in any of them.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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**CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI**

Pursuant to Rules 12.5 and 13.4 of this Court's rules, Cross-Petitioners, NLC, NATOA, USCM, NACo and TCCFUI, respectfully request that, if the Court grants the petition for writ of certiorari in *Federal Communications Commission and United States, et al. v. Brand X Internet Services, et al.*, No. 04-281 (filed Aug. 27, 2004), and/or the petition for writ of certiorari in *National Cable & Telecommunications Association, et al. v. Brand X Internet*

Services, et al., No. 04-277 (filed Aug. 30, 2004), then the Court also should issue a writ of certiorari to review the judgment of the court of appeals on the questions presented in this conditional cross-petition.

OPINION AND ORDER BELOW

The Conditional Cross-Petitioners incorporate by reference the "Opinions Below" section in the Petition for Writ of Certiorari in No. 04-277 ("FCC Petition").[1]

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. Cross-Petitioners filed a timely petition for rehearing on November 19, 2003, which the court of appeals denied on March 31, 2004 (FCC App. 204a-207a). On June 16, 2004, Justice O'Connor extended the time for filing a petition for certiorari through July 29, 2004, and again extended the time for filing on July 20, 2004 until August 30, 2004. The FCC Petition was filed on August 27, 2004, the NCTA Petition was filed on August 30, 2004, and the response date for each was set as September 30, 2004. The

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[1] Copies of the Federal Communications Commission's *Declaratory Ruling* and the Ninth Circuit's opinion are reproduced in the Appendix to the FCC Petition and are not reproduced here. References to the FCC Petition will be cited as "FCC Pet." References to the Appendix to the FCC Petition will be cited as "FCC App." References to the Appendix to this Conditional Cross-Petition will be cited as "Cross-Pet. App." References to the Petition for Writ of Certiorari in 04-281 ("NCTA Petition") will be cited as "NCTA Pet." References to the Appendix to the NCTA Petititon will be cited as "NCTA App."

Court has jurisdiction over this cross-petition under 28 U.S.C. § 1254(1) and Rules 12.5 and 13.4 of this Court.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 522(6) & (14) are set forth in the FCC App. at 212a-213a. An additional relevant provision of the Communications Act, 47 U.S.C. § 544(b), and relevant provisions of the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, § 1104(8)(B), *codified at* 47 U.S.C. § 151 note ("ITFA"), are set forth in Cross-Pet. App. at 1-3a.

STATEMENT

Cross-Petitioners agree with the Federal Communications Commission and the United States ("Federal Petitioners") and the petitioners in No. 04-277 ("NCTA Petitioners") that the classification of cable modem service under the Communications Act presents an issue of exceptional importance worthy of this Court's review. Cross-Petitioners also agree that the Court's review is particularly appropriate here because, absent such review, this important question would be decided nationwide by the Ninth Circuit's decision based solely on what that court perceived as the *stare decisis* effect of its prior decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2002), without any meaningful judicial review of the merits of the arguments for the various possible classifications of cable modem service. Cross-Petitioners further agree that the court of appeals misconstrued this Court's precedents with regard to the application of *stare decisis* and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Cross-Petitioners part ways, however, with the Federal Petitioners and the NCTA Petitioners with respect to their contention that proper application of the *Chevron* standard to the Commission decision under review necessarily means that decision must be upheld in all respects. This Court should not grant review of the court of appeals decision simply to rubber-stamp the FCC's *Declaratory Ruling*. Both the Federal Petitioners and the NCTA Petitioners improperly truncate the two-step evaluation required under *Chevron* and its progeny. If the Court grants review of the court of appeals decision, it should either (1) assess the *Declaratory Ruling*'s analysis of all three options for classifying cable modem service -- "information service," "cable service," and "telecommunications service" -- under the *Chevron* standard, or (2) remand the case to the Ninth Circuit with instructions that that court do so in the first instance.

1. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress amended, and expanded, the definition of "cable service" by adding the phrase "or use" to the upstream half of the "cable service" definition in 47 U.S.C. § 522(6)(B). The amendment revised the definition to read as follows:

> the term 'cable service' means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service.

47 U.S.C. § 522(6) (emphasis added to reflect 1996 amendment).

Even before the 1996 amendment, the "cable service" definition extended beyond the multichannel video services traditionally thought of as cable television service to include any "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The Joint Conference Report accompanying the 1996 Act makes clear what this expansion of the "cable service" definition was intended to accomplish:

> The conferees intend the amendment [adding "or use" to the "cable service" definition] to reflect the evolution of cable to include interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*.[2]

The *1996 Conference Report*'s references to "information services" and "enhanced services" were no accident. In the very same 1996 Act, Congress also for the first time codified the term "information services" in the Communications Act, 47 U.S.C. § 153(20) (FCC App. at 208a). As the Commission's *Declaratory Ruling* under review here acknowledges, the new 1996 statutory definition of "information service" was itself derived from the Commission's prior rule definition of "enhanced services," which was then incorporated into the AT&T Consent Decree as the definition of "information services." (FCC App. at 89a-90a, n.163.) And as both the Department of Justice, in

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[2] H.R. Confer. Report No. 458, 104th Cong., 2d Sess. 169 ("*1996 Conference Report*"), *reprinted in* 1996 U.S.C.C.A.N. 124, 182 (emphasis added).

construing the AT&T Consent Decree,[3] and the Commission itself[4] had previously concluded, even under the narrower, pre-1996 version of the Communications Act's "cable service" definition, cable service was an "information service" within the meaning of that Consent Decree.

Thus, while the Federal Petitioners (FCC Pet. at 5-7) and the NCTA Petitioners (NCTA Pet. at 4 & 13) correctly identify the three possible classifications of cable modem service under the Communications Act ("information service," "cable service" and "telecommunications service"), they fail to point out that, unlike the "information service" and "telecommunications service" alternatives, the "information service" and "cable service" alternatives are *not* mutually exclusive. To the contrary, "cable service" includes any "information service" that "a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14), as well as all "subscriber interaction, if any, which is required for the selection or *use*" of such information, 47 U.S.C. § 522(6)(B) & (14) (emphasis added).

2. Prior to the Commission's March 2002 *Declaratory Ruling* that is the subject of this case, most cable operators treated cable modem service as a "cable service" and therefore included revenues derived from cable modem service in the revenue base on which those operators paid local governments the 5% franchise fee allowed by 47 U.S.C. § 542. (Indeed, two of the four NCTA Petitioners argued in

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[3] U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment in *U.S. v. Western Electric Co.*, 47 Fed. Reg. 23320, 23335 (May 27, 1982).

[4] *Telephone Company-Cable Television, Cross-Ownership Rules*, Notice of Inquiry, 2 FCC Rcd 5092, 5096 n.26 (1987).

their comments to the Commission below that cable modem service was both a "cable service" and an "information service.") Moreover, contrary to the suggestion of the Federal Petitioners (FCC Pet. at 24-25), and the NCTA Petitioners (NCTA Pet. at 19), classifying cable modem service as a "cable service" under Title VI of the Communications Act would not expose cable modem service to extensive regulation at all. Rather, as an "other programming service," 47 U.S.C. § 522(14), rather than a "video programming service," 47 U.S.C. § 522(20), cable modem service would be largely unregulated because it would be preemptively exempt from most of the requirements of Title VI other than payment of franchise fees, 47 U.S.C. § 542, and customer service and privacy requirements, 47 U.S.C. §§ 551 & 552. *See also* 47 U.S.C. § 521(6) (Title VI designed to "promote competition in cable communications and minimize, unnecessary regulation that would impose an undue economic burden on cable systems").

3. As the Federal Petitioners (FCC Pet. at 10 & n. 3) and NCTA Petitioners (NCTA Pet. at 7-10) point out, prior to the Commission's *Declaratory Ruling*, a few courts had addressed the regulatory classification of cable modem service, with conflicting results. One court, for example, concluded that cable modem service is a "cable service."[5] Another concluded that cable modem service is a "information

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[5] *Media One Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 715 (E.D. Va. 2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

service" but not a "cable service" or a "telecommunications service."[6] In *Portland*, the decision that proved dispositive of the outcome in the court of appeals below, the Ninth Circuit ruled that cable modem service is neither a "cable service" nor a single, integrated "information service," but instead contains separate "telecommunications service" and "information service" elements. 216 F.2d at 876-879. As the Federal Petitioners (FCC Pet. at 13) and the NCTA Petitioners (NCTA Pet. at 6 & 12), correctly recognize, however, the "parties did not brief the regulatory classification issue" in *Portland*. (FCC App. at 115a.) As a result, the *Portland* court decided the case on a ground not argued by the parties and, perhaps more importantly, without the benefit of any briefing by the parties as to why both had agreed that cable modem service is a "cable service."

4. Shortly before the Commission issued its *Declaratory Ruling*, this Court rendered its decision in *NCTA v. Gulf Power*, 534 U.S. 327 (2002). Although the Court was urged to reach the cable modem classification issue there, it specifically declined to do so. Instead, the Court cited the Commission proceeding that culminated in the *Declaratory Ruling*, noting that the FCC had already decided that cable modem service was not a "telecommunications service," and twice noting that the FCC had not decided whether that service was a "cable service." 534 U.S. at 337-338. In a separate opinion, the remaining two Justices who did not join the opinion of the Court in *Gulf Power* also cited the Commission proceeding that culminated in the *Declaratory Ruling* as where the classification issue would be addressed

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[6] *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd on other grounds sub nom. NCTA v. Gulf Power*, 534 U.S. 327 (2002).

and noted, with no apparent preference, the conflict between the *Henrico* decision finding cable modem to be a "cable service" and the *Portland* decision finding it to be a "telecommunications service." *Id.* at 349-50 nn. 1 & 2, 354-55 & n.5 (Thomas, J., concurring in part and dissenting in part).

5. Cross-Petitioners filed comments and reply comments in the Commission proceeding that led to the *Declaratory Ruling*, arguing that cable modem service is a "cable service." In March 2002 the Commission issued the *Declaratory Ruling*, 17 FCC Rcd 4798 (2002) (FCC App. at 40a-181a), that gave rise to this litigation, and concluded that cable modem service is neither a "cable service" nor a "telecommunications service," but a single, integrated, interstate "information service." The Commission generally declined to follow *Portland* (FCC App. at 114a-116a), and although it concluded that cable modem service is not a "cable service," it did not cite *Portland* at all in its "cable service" analysis (*id.* at 118a-132a). Rather, it relied on the different rationale that "one-way transmission" in § 522(6)(A) means that, to be a "cable service," a cable operator must have editorial control over service content and that, while operators do exercise some control over cable modem service content, they do not exert control over most of it. *Id.*

The Commission construed the term "transmission" in 47 U.S.C. § 522(6)(A) as requiring the cable operator to exercise "control over the selection of content offered to subscribers." (*Id.* at 121a-122a.) Conceding that "some cable operators or their affiliated ISPs may themselves produce or obtain the rights to content" included in cable modem service, the Commission nevertheless concluded that cable modem service did not satisfy the "transmission" requirement because "cable

operators do not control the majority of information accessible by cable modem subscribers." (*Id.*)

With regard to the phrase "or use," added to 47 U.S.C. § 522(6)(B) in 1996, the Commission rejected the argument that this addition "bring[s] cable modem service within the definition of cable service." (*Id.* at 127a-128a.) The Commission did not address the plain, and broad, meaning of the phrase, "or use." And the Commission also acknowledged that the *1996 Conference Report* explaining that phrase states that it was intended "to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services." (FCC App. at 126a.) The Commission, however, disdained reliance on the *1996 Conference Report* because, in its view, "the language of the statute itself does not reflect [the intent expressed in the legislative history]." (*Id.* at 126a-127a.)

The Commission likewise spurned the argument that the 1998 Internet Tax Freedom Act[7] supports the conclusion that cable modem service is a "cable service." Recognizing that the ITFA contains an exemption for cable franchise fees, an exemption that would seem superfluous if cable modem service were not a "cable service," the Commission nevertheless concluded that, since the ITFA was enacted after the 1996 amendment to the "cable service" definition and did not alter that definition, it was not dispositive. (*Id.* at 131a.)

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[7] Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998) ("ITFA"), *codified at* 47 U.S.C. § 151 note.

Ultimately, the Commission rested its decision that cable modem service is not a "cable service" on its view that the "transmission" requirement of § 522(6)(A) requires a cable operator to "be in control of selecting and distributing content" and that, because the subscriber rather than the operator is in "ultimate control" of what the Commission called the "Internet experience," cable modem service does not satisfy the cable operator control requirement of "transmission." (*Id.* at 127a-129a.) According to the Commission, that "discrete parts of cable modem service have characteristics of cable service" does not matter because cable modem service is an "integrated" service that "is predominately Internet access." (*Id.* at 130a-131a.)

6. Cross-Petitioners filed a timely petition for review of the *Declaratory Ruling* in the D.C. Circuit. Other parties filed petitions for review of the *Declaratory Ruling* in the D.C., Third and Ninth Circuits. By random assignment pursuant to 28 U.S.C. § 2112, the cases were consolidated in the Ninth Circuit, home of the *Portland* decision. On October 6, 2003, the court of appeals issued a per curiam opinion affirming in part, vacating in part, and remanding the *Declaratory Ruling*. The per curiam opinion held that *stare decisis* bound the court of appeals to *Portland*, and that cable modem service therefore was not a "cable service" or a single, integrated "information service," but instead contained a separate "telecommunications service" component. (FCC App. at 3a-22a.) Judge O'Scannlain wrote a separate concurrence stating that while he felt bound by *stare decisis*, he was uncomfortable with that result. (*Id.* at 22a-25a.) Judge Thomas, the author of *Portland*, wrote separately to state that he viewed the question as "one of pure statutory interpretation" not subject to deference and that, even if he were not bound by *stare decisis*, he would still reach the same result as he did in *Portland*. (*Id.* at 25a-39a.) Because of

stare decisis, none of the panel opinions addressed the merits of Cross-Petitioners' arguments that cable modem service is a "cable service."

7. On March 31, 2004, the court of appeals denied petitions for rehearing en banc, including a petition filed by Cross-Petitioners, with Judge O'Scannlain voting to grant rehearing en banc. (FCC App. at 205a-207a.)

REASONS FOR GRANTING THE CROSS-PETITION

If the Court grants the Federal Petitioners' petition in No. 04-281 or the NCTA Petitioners' petition in No. 04-277, or both, it should grant this cross-petition as well. Cross-Petitioners agree with the Federal Petitioners and NCTA Petitioners (and the *Declaratory Ruling* under review) that cable modem service is an "information service." For that very reason, however, we disagree with the *Declaratory Ruling*'s conclusion that cable modem service is not also a "cable service." Indeed, as a result of the 1996 amendment expanding the "cable service" definition, cable modem service is a "cable service" precisely because it is an "information service" that a "cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14), and includes all upstream subscriber interaction that "is required for the ... *use* of such [information made available to all subscribers generally]," 47 U.S.C. § 522(6)(B) (emphasis added).

Due to peculiar procedural circumstances, however, the court of appeals has never addressed the merits of this "cable service" argument. In *Portland*, the court of appeals did not address these arguments because it decided the case on grounds not argued by the parties and thus without the benefit of full briefing of the "cable service" issue. And in the panel

decision under review, a case assigned to it randomly under 28 U.S.C. § 2112, the court of appeals never addressed the merits of Cross-Petitioners "cable service" arguments because it felt itself bound by *Portland*. Had the petitions for review of the *Declaratory Ruling* been consolidated and transferred to any other circuit, each of the arguments for the proper classification of cable modem service -- for "cable service," for "information service" and for "telecommunications service" -- would have received complete review, free from the dead-hand *stare decisis* effect of *Portland*. And any other circuit also would have reviewed whether and to what extent deference was due the Commission's decision under *Chevron*.

Given these circumstances, the Court should grant review with all of the potential cable modem service classifications -- "information service," "cable service," and "telecommunication service" -- before it. These alternatives are, of course, the ones this Court recognized in its decision in *Gulf Power*, decided after *Portland*. *See* 534 U.S. at 337-38, & 349-50 nn. 1 & 2, & 354-55 & n. 5) (Thomas, J., concurring in pat and dissenting in part). The question the Court left open in *Gulf Power* should now be resolved. An issue of such immense importance deserves no less.

I. THE COURT SHOULD REVIEW THE COMMISSION'S DECISION UNDER THE PROPER *CHEVRON* STANDARD.

In reviewing agency decisions such as the *Declaratory Ruling*, courts normally apply the familiar two-prong test adopted by this Court in *Chevron*: (1) whether Congress has spoken to the statutory question at issue and, if so, whether the agency's interpretation is consistent with congressional intent; and (2) if the statutory language is instead ambiguous, whether the agency's construction of the statute is a

reasonable one.

Rather than applying *Chevron* here, however, the court of appeals held that *stare decisis* gave it no choice but to follow the statutory construction it had previously adopted in *Portland*. As a result, the court of appeals failed to address either of the two *Chevron* prongs, or the parties' arguments on the merits on each of these prongs. Thus, in the case of the "cable service" classification issue, the court of appeals did not even consider Cross-Petitioners' arguments that (1) the only way to read several provisions of the Communications Act, the pertinent legislative history, and the ITFA together in a consistent way is to classify cable modem service as a "cable service," and (2) even if the statute were ambiguous, the rationale offered by the *Declaratory Ruling* as to why cable modem service is not a "cable service" is not a reasonable interpretation of the statute.

The only question truly addressed by the court of appeals involved the interplay between *stare decisis* and *Chevron*. And the court of appeals answered that question incorrectly. It could be argued that if this Court grants certiorari, it should end its inquiry with this question. The Federal Petitioners and the NCTA Petitioners, however, have not requested that the Court remand this case with instructions that the Ninth Circuit engage in the appropriate *Chevron* analysis in the first instance, but instead appear to request that this Court engage in that analysis in the first instance. Cross-Petitioners join these petitioners in this sentiment.

While it is true that the Court ordinarily will not address questions in the first instance that have not been passed upon below, it has done so on occasion. *See*, *United States v. Mendenhall*, 446 U.S. 544 (1980); *Youakim v. Miller*, 425 U.S. 231 (1976). In *Mendenhall*, the Court ruled on an

argument presented by the United States even though the court below had not considered the argument. This Court held that the assumption of the lower courts rested on a misapprehension of federal constitutional law, requiring correction. The Court also held that the determination of the unpassed upon question was essential to the disposition of the case. The Court therefore considered the question to be "fairly comprised" by the questions presented in the petition for certiorari. This is one of those rare exceptions where such action is warranted. The sheer importance of the issue calls for a speedy resolution. The Court should rule on the substance of the proper classification of cable modem service and consider all of the possible classifications of cable modem service. Moreover, since the *Chevron* analysis is a purely legal one, there is no need to remand for additional facts.

If, however, the Court were to conclude otherwise, Cross-petitioners request that, at a minimum, the Court grant review and remand the case to the court of appeals with instructions to review the *Declaratory Ruling* -- and all three of the classification alternatives ("cable service," "information service" and "telecommunications service") -- under the *Chevron* standard.

II. THE *DECLARATORY RULING*'S CONCLUSION THAT CABLE MODEM SERVICE IS NOT A "CABLE SERVICE" DOES NOT SURVIVE *CHEVRON* REVIEW.

We agree with the Federal Petitioners (FCC Pet. at 14) that the regulatory status of cable modem service is an issue of "vital importance" justifying this Court's review. We disagree, however, with the apparent view of the Federal Petitioners and the NCTA Petitioners that review of the *Declaratory Ruling* implicates only the second prong of

Chevron and that application of that prong yields a pro forma upholding of the Commission's decision (FCC Pet. at 16). To the contrary, at least with respect to the Commission's conclusion that cable modem service is not a "cable service," the *Declaratory Ruling* fails both the first and second prongs of *Chevron*.

A. The *Declaratory Ruling*'s "Cable Service" Analysis Is Flawed Under The First Prong of *Chevron*.

Under the first prong of *Chevron*, the question is whether Congress has spoken on the statutory question, 467 U.S. at 842-43. As this Court has observed, under the first prong of *Chevron*, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 229 (1994). *Accord*, *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988); *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Nor does *Chevron* permit an agency to cast aside the ordinary tools of statutory construction, such as the legislative history and language in related statutory provisions. *E.g.*, *Chevron*, 467 U.S. at 843 & n.9.

That is especially true here where, unlike the typical *Chevron* case, the issue presented involves the meaning of a term, "cable service," that Congress itself chose to define. Congress wrote an elaborate definition, separately defining several components of the "cable service" definition, *see* 47 U.S.C. §§ 522(6), 522(14) & 522(20), and amplifying its intent still further with extensive discussions of the "cable service" definition in the legislative history, both in 1984 and

1996. Because Congress spoke so comprehensively on the "cable service" definition, deference would be inappropriate:

> Had Congress not provided a 'precise definition ... for the exact term the Commission now seeks to redefine,' ...., the Commission's interpretation might well be entitled to deference. In the face of a clear statutory definition, however, these is no occasion for deference.[8]

Yet, in deciding that cable modem service is not a "cable service," the Commission's *Declaratory Ruling* casts aside all of the rules of statutory construction that this Court counseled in *Chevron* should be considered. Those rules of construction point clearly to the conclusion that Congress intended "cable service" to include all "information services" made available to subscribers generally over a cable system, meaning that cable modem service is a "cable service."

Congress has defined "cable service" as:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service.

47 U.S.C. § 522(6) (emphasis added). Congress added the phrase "or use" in the Telecommunications Act of 1996, and the plain meaning of "use" -- encompassing *any* type of

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[8] *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995) (citing and quoting *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987)).

"interaction" required for "use" of "other programming service" -- is quite broad. The *1996 Conference Report*, the most reliable form of legislative history,[9] confirms this broad plain meaning, leaving no doubt as to Congress' purpose in expanding the "cable service" definition:

> The conferees intend the amendment [adding "or use" to the "cable service" definition] to reflect the evolution of cable to include *interactive services* such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*.[10]

"Other programming service" is defined broadly as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The legislative history describes this definition's broad language as encompassing non-video, on-line services, such as "computer video games," and "news services, stock market information, and on-line airline guides" created by third parties that are used by and useful to only subscribers with computers.[11]

It cannot seriously be disputed that cable operators make cable modem service "available to all subscribers generally," or that cable modem service permits all subscribers to surf the same websites, to join the same chat rooms, to scan the same message boards, and to obtain the same "information" that is

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[9] *E.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986).

[10] *1996 Conference Report* at 169 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 182 (emphasis added).

[11] H.R. Rep. No. 934, 98th Cong., 2d Sess. 42-44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4679-81.

"generally available" to each cable modem subscriber. The 1996 amendment, in turn, means that subscriber-specific "*use*" of such "other programming service" is a "cable service."

This conclusion is supported not only by the plain language and legislative history of the "cable service" definition, but by other statutory provisions and Commission decisions as well. Another provision of Title VI of the Communications Act, for instance, refers to local cable franchising authorities' ability to "establish requirements for video programming *or other information services*," 47 U.S.C. § 544(b)(1) (emphasis added), a reference that makes no sense unless, as the language and legislative history of § 522(6) clearly contemplate, "cable service" includes *both* "video programming" and "other information services" offered to subscribers over a cable system. Similarly, in the ITFA, originally enacted in 1998, just two years after Congress expanded the "cable service" definition, Congress explicitly exempted cable franchise fees under 47 U.S.C. § 542 from the Internet tax moratorium, an exemption that would be meaningless surplusage if, as the *Declaratory Ruling* and the court of appeals concluded, cable modem is not a "cable service."

Yet the *Declaratory Ruling* sidesteps these guides to statutory construction. It ignores half of the "cable service" definition (47 U.S.C. § 522(6)(B)), downplays the broad definition of "other programming service" in 47 U.S.C. § 522(14), effectively repeals the 1996 addition of "or use" to § 522(6)(B), avoids the pertinent 1984 and 1996 legislative histories that are at odds with its position, dismisses the reference to "information services" in § 544(b), and reduces a provision of the ITFA to surplusage (FCC App. at 118a-132a).

The Commission's goal is clear: To satisfy its preferred policy objective of placing cable modem service and other forms of broadband Internet access into the same regulatory category. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002). But in construing the definition of "cable service," the Commission's task "is to determine not what [cable service] *ought* to mean, but what it *does* mean." *Atlantic Mutual Ins. Co. v. Comm'n of Internal Revenue*, 523 U.S. 382, 387 (1998) (emphasis in original). The Commission's "estimations of desirable policy cannot alter the meaning" Congress gave to "cable service." *MCI Telecommunications*, 512 U.S. at 234. That meaning, as revealed by the plain language of § 522(6) and its component parts, the 1996 and 1984 legislative histories, and the ITFA, points to but one conclusion: cable modem service is a "cable service."

B. The *Declaratory Ruling*'s "Cable Service" Analysis Likewise Fails The Second Prong of *Chevron*.

Even assuming *arguendo* that the statute is ambiguous as to whether cable modem service is a "cable service," and thus the deferential second prong of *Chevron* applies, the Commission's conclusion that cable modem service is not a "cable service" still must be reasonable -- that is, it must be based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Yet the *Declaratory Ruling* does not even clear that hurdle.

As an initial matter, it cannot be reasonable for the Commission, in construing the statutorily-defined term "cable service," to essentially write half of the definition -- § 522(6)(B) -- out of the statute, to give no meaning at all to

Congress' explicit expansion of the "cable service" definition in 1996, and to ignore that the Commission's narrow construction of the "cable service" definition would render language in other statutory provisions -- 47 U.S.C. § 544(b) and the ITFA -- meaningless or nonsensical. But the *Declaratory Ruling*'s conclusion on the "cable service" issue is unreasonable for the additional reasons that it is internally inconsistent and departs without explanation from the Commission's own prior precedent.

The core of the Commission's reasoning as to why cable modem service is not a "cable service" is that "one-way transmission" in § 522(6)(A) means that, to be a "cable service," a cable operator must have editorial control over cable modem service, and according to the Commission, cable operators do not possess such control. (FCC App. at 121a-122a & 127a.) Yet this reasoning flies in the face of the *Declaratory Ruling*'s finding that cable modem service often includes "access to content that [cable] operators have created or aggregated ... specifically for the benefit of their subscribers," such as "content targeted to a specific locality, *much as cable operators do in their video service offerings*."[12] And the Commission is also inexplicably mute about its own recognition, both in the rulemaking accompanying the *Declaratory Ruling* and the Commission's own earlier decision, that cable operators do in fact have "absolute

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[12] FCC App. a 55a-56a (emphasis added). *See also id.* at 122a & 130a (cable operators and their affiliated ISPs "may themselves produce or obtain the rights to content accessible through their websites" and [i]nclud[e] proprietary information or packages of pre-selected web site links in [cable modem] services").

control" over all content delivered via cable modem service.[13] That cable operators have, so far at least, voluntarily chosen not to exploit that control more fully by blocking some Internet content -- or, more accurately, that operators have made the editorial decision that, at this time, it is in their marketplace (or strategic regulatory) interest to provide unfiltered Internet access content -- does not, and cannot, alter the fact that they possess such control.

Finally, even if the Commission's "editorial control" rationale on the "cable service" question were not internally inconsistent in these respects, the *Declaratory Ruling* never resolves the inherent tension between, on the one hand, its lack-of-editorial-control rationale for cable modem service not being a "cable service" and, on the other hand, its rationale for cable modem service not containing a separate "telecommunications service" component. If it really is true, as the *Declaratory Ruling* suggests, that cable operators have no editorial control over cable modem service content, then by process of elimination that content must then be controlled by cable modem service users -- *i.e.*, cable modem subscribers and website hosts. But if that were true, then the *Declaratory Ruling*'s conclusion that cable modem service does not contain a separate "telecommunications service" element must be wrong. The Commission simply cannot have it both ways.

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[13] *Applications for Consent to Transfer of Control of Licenses by Time Warner and America Online to AOL Time Warner*, 16 FCC Rcd. 6547, 6586, ¶87 & n. 275 (2001); *Internet Over Cable*, Notice of Proposed Rulemaking, 17 FCC Rcd. at ¶87 (2002) (FCC App. at 146a).

III. THE COURT OF APPEALS' AFFIRMANCE OF THE COMMISSION'S "CABLE SERVICE" RULING ON THE ALTERNATIVE RATIONALE OF *PORTLAND* IS CONTRARY TO PRECEDENT OF THIS COURT.

Even assuming *arguendo* that the court of appeals was correct in feeling itself bound by its prior decision in *Portland*, it should not have affirmed the Commission's ruling on the "cable service" issue. Instead, this Court's precedent makes clear that the court of appeals should have vacated and remanded the "cable service" issue as it did with the balance of the *Declaratory Ruling*.

The court of appeals should not have relied on the rationale of *Portland* to affirm the *Declaratory Ruling*'s "cable service" conclusion because the Commission did not rely at all on *Portland*'s rationale in reaching that result. In fact, the *Declaratory Ruling* generally rejects the Ninth Circuit's reasoning in *Portland* (FCC App. at 114a-116a), and does not even refer to *Portland*, much less rely on it, in concluding that cable modem service is not a "cable service" (*id.* at 118a-132a). For example, the *Declaratory Ruling* never suggests, as did *Portland*, 216 F.3d at 877, that applying certain Title VI provisions to cable modem service would "lead to absurd results," and for good reason: Each of the provisions cited in *Portland*, 47 U.S.C. §§ 531, 532, 534, & 535, applies only to "video programming," 47 U.S.C. § 522(20), and thus would be inapplicable to "other programming service," 47 U.S.C. § 522(14), which is the prong of the "cable service" definition applicable to cable modem service. FCC App. at 122a-123a. *See also Internet Ventures*, 15 FCC Rcd 3247 (2000).

Because the *Declaratory Ruling* relied on different reasoning than *Portland*, this Court's precedent is clear that the court of appeals could not properly affirm the *Declaratory Ruling*'s result on the "cable service" issue on the alternative ground of the reasoning in the court of appeals' earlier decision in *Portland*. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). As this Court has held, "an agency's action must be upheld, if at all, on the basis established by the agency itself." *Motor Vehicle Mfrs' Assn. v. State Farm*, 463 U.S. 29, 50 (1983). Accordingly, the court of appeals' decision to affirm, rather than to vacate and remand, the *Declaratory Ruling*'s "cable service" conclusion was clearly in error.

IV. THE CLASSIFICATION OF CABLE MODEM SERVICE HAS ENORMOUS POTENTIAL FISCAL CONSEQUENCES FOR THE NATION'S LOCAL GOVERNMENTS.

Prior to the *Declaratory Ruling* in March 2002, the vast majority of cable operators nationwide treated cable modem service as a "cable service" and included revenues from cable modem service revenues in the 5% cable franchise fee they paid to local governments under 47 U.S.C. § 542. After the *Declaratory Ruling*, however, cable operators ceased including cable modem service revenues in franchise fee payments.

The financial impact on local governments of denying them bargained-for compensation in the form of the 5% cable franchise fee on revenues generated by cable modem service is enormous. Cable modem service revenues in the United States are estimated to be $9.4 billion per year by the end of

2005.[14] Assuming that cable modem service annual revenue is $9.4 billion, the *Declaratory Ruling* means that, collectively, local governments stand to lose as much as $470 million in cable franchise fees per year. Clearly, revenue losses of that magnitude have enormous adverse financial consequences for the nation's local governments. These revenues would be available for any number of projects and services that make communities safer and more livable, and provide high quality education services to allow citizens to make full use of the rapid changes in technology. In addition, the revenues are often used to maintain and repair infrastructure where cable services equipment, including lines for the use of cable modem services, are located. Without these revenues, citizens are subsidizing cable providers access to that infrastructure.

Nor can it be seriously suggested that payment of franchise fees on cable modem service has had any discernible adverse impact on the deployment or subscribership of cable modem service. As Robert Sachs, President and CEO of NCTA testified before Congress on July 21, 2003, "It's really hard to believe that cable modem service has existed as a consumer service only for about seven years, *with most deployment and growth taking place since 1999.*"[15] It was not until the spring of 2002 that the Commission declared cable

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[14] *See* CISCO SYSTEMS INC., RESIDENTIAL CABLE SERVICES 1 at http://www.cisco.com/application/pdf/en/us/guest/netsol/ns289/c714/ccmigration_09186a008014e05f.pdf.

[15] *Regulation of Broadband Hearing Before the House Comm. On Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 2003 WL 21694487 (F.D.C.H.) (July 21, 2003) (statement of Robert Sachs, President & Chief Executive Officer, National Cable & Telecommunications Association).

modem service to be an information service, placing it outside local government ability to impose a cable franchise fee. Yet cable modem service experienced much of its greatest growth in deployment and subscribership during a time when cable operators were paying local governments the 5% cable franchise fee on cable modem service.

Whether or not one agrees that the only way to read the cable service-related statutory provisions, legislative history and prior Commission decisions together in a consistent way is to conclude that cable modem service is a "cable service," these arguments should not be swept under the rug by a peculiar convergence of procedural circumstances: the arguments not being raised in *Portland* because the panel there elected to reach and decide an issue not briefed by the parties, this case having been assigned to that court of appeals randomly under 28 U.S.C. § 2112, and that court of appeals' consequent failure to confront the merits of the "cable service" arguments due to the *stare decisis* effect of *Portland*. One way or another, these arguments merit full judicial review and resolution on the merits. The cable modem service classification issue is one of clear nationwide and exceptional importance, as it affects not only hundreds of millions of dollars in local cable franchise fees for the nation's local governments under 47 U.S.C. § 542, but also the regulatory framework applicable to the most widely subscribed-to form of broadband Internet access.

CONCLUSION

If the petitions for a writ of certiorari in either 04-181 or 04-177, or both, are granted, then this conditional cross-petition also should be granted.

Respectfully submitted,

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APPENDIX A

STATUTORY APPENDIX

1. 47 U.S.C. 544 provides in pertinent part

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system--

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services; and
(2) subject to section 545 of this title, may enforce any requirements contained within the franchise--
(A) for facilities and equipment; and
(B) for broad categories of video programming or other services.

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2. Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998) ("ITFA"), *codified at* 47 U.S.C. § 151 note, provides in pertinent part

MORATORIUM.

(a) MORATORIUM.--No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act--

(1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and

(2) multiple or discriminatory taxes on electronic commerce.

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DEFINITIONS.

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(8) TAX.--
(A) IN GENERAL.--The term "tax" means--
(i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or
(ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.
(B) EXCEPTION.--Such term does not include any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573), or any other fee related to obligations or telecommunications carriers

under the Communications Act of 1934 (47 U.S.C. 151 et seq.).

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IN THE
Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES

Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CROSS-RESPONDENT, THE UTILITY, CABLE & TELECOMMUNICATIONS COMMITTEE OF THE CITY COUNCIL OF NEW ORLEANS IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it affirmed the FCC's conclusion that cable modem service is not a "cable service" within the meaning of Title VI of the Communications Act, 47 U.S.C. § 522(6).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans, states the following:

The New Orleans City Council is the legislative branch of local government for the City of New Orleans. The Utility, Cable & Telecommunications Committee of the City Council of New Orleans oversees the City Council's regulatory authority over utility, cable and telecommunication matters and makes recommendations to the full City Council concerning rates and services. As a result, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans does not have a parent corporation.

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OPINION AND ORDER BELOW

This Brief in Support of the Conditional Cross-Petitioners' Writ of Certiorari incorporates by reference the "Opinions Below" section of the Petition for Writ of Certiorari in No. 04-277 (FCC Petition).[1]

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[1] Copies of the Federal Communications Commission's Declaratory Ruling and the Ninth Circuit's Opinion are reproduced in the Appendix to the FCC Petition and are not reproduced here. References to the FCC Petition will be cited as "FCC Pet." References to the Appendix to the FCC Petition will be cited as "FCC App." References to the Conditional Cross-Petition will be cited as "Cross Pet." References to the Appendix to the Conditional Cross-Petition will be cited as "Cross Pet. App."

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on October 6, 2003. Cross-Petitioners filed a timely Petition for Rehearing on November 19, 2003, which the Court of Appeals denied on March 31, 2004. On June 16, 2004, Justice O'Connor extended the time for filing a Petition for Certiorari through July 29, 2004 and on July 20, 2004 again extended the time for filing until August 30, 2004. The FCC Petition was filed on August 27, 2004, the NCTA Petition was filed on August 30, 2004 and the response date for each was set as September 30, 2004. On September 30, 2004, the National League of Cities, National Association of Telecommunications Officers and Advisors, United States Conference of Mayors, National Association of Counties, and Texas Coalition of Cities for Utilities Issues, filed a Conditional Cross-Petition for Writ of Certiorari, which was placed on this Court's docket on October 5, 2004. This Court has jurisdiction over the Cross-Petition under 28 U.S.C. § 1251 (1) and Rules 12.5 and 13.4 of this Court. This Court has jurisdiction over this Brief in Support of the Conditional Cross-Petition pursuant to Rules 12.5 and 6 of this Court.

STATEMENT OF THE CASE

On September 28, 2000, the Federal Communications Commission ("FCC") released a Notice of Inquiry in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185, 15 Commission Rcd 19287 (2000) to explore the issues surrounding high-speed access to the Internet over cable infrastructures. Specifically, the Commission sought comments from the public as to how cable modem service should be classified, *e.g.,* "telecommunication service," a "cable service," an "information service," or a hybrid of all three types.

In response to the *Notice of Inquiry*, Cross-Respondent, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans ("CNO") filed Comments wherein it was asserted that (1) cable modem service should be classified as a "cable service;" and (2) cable operators should pay franchise fees on revenues derived from cable modem service.

On March 15, 2002, the FCC released its *Declaratory Ruling* and *Notice of Proposed Rulemaking*. The FCC concluded that the cable modem service is classified as an interstate information service and is subject to Commission jurisdiction. The Commission also determined that cable modem service is not a "cable service" as defined by the Communications Act. Additionally, the Commission declared that cable modem service does not contain a separate "telecommunications service" offering and is not subject to common carrier regulation. (FCC App. at 48a.)

Cross-Respondent originally filed its Intervention in the United States Court of Appeals for the District of Columbia Circuit, where venue was proper pursuant to 28 U.S.C. § 2343. The Judicial Panel on Multi-District Litigation consolidated all of the various petitions for

review in the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(3), and the D.C. Circuit transferred its case to this Court pursuant to 28 U.S.C. § 2112(a)(5). Subsequently, Cross-Respondent timely filed its Intervention in the D.C. Circuit on April 9, 2002, which was granted on May 14, 2002.

As described herein, Cross-Respondent challenges the conclusions reached by the FCC and the Ninth Circuit regarding the classification of cable modem service.

On October 6, 2003, the Ninth Circuit Court of Appeals rendered a decision adhering to its prior ruling in *AT&T v. City of Portland*, 216 F.3d 817 (9th Cir. 2000), under the doctrine of *stare decisis*, the court affirmed the FCC's ruling that cable modem service is not a cable service and vacated the ruling as it relates to the classification as a paid "telecommunications service." (FCC App. A)

ARGUMENT

Cross-Respondent, CNO, agrees with all Petitioners in this case that the classification of cable modem service under the Communications Act of 1934 presents an issue of exceptional public importance, which is deserving of this Court's consideration. Moreover, the Ninth Circuit failed to meaningfully review the merits of the arguments for the various possible classifications of cable modem service.

However, Cross-Respondent disagrees with the FCC's conclusion that cable modem service is not a cable service.

For the reasons stated herein, Cross-Respondent supports the Conditional Cross-Petition for Writ of Certiorari and respectfully request that it be granted if the FCC Petition in No. 04-281, the NCTA Petition in No. 04-277 or both are granted.

I. THE NINTH CIRCUIT ERRED BY AFFIRMING THE FCC'S CLASSIFICATION OF CABLE MODEM SERVICE.

The Ninth Circuit erred when it affirmed the FCC's decision to classify cable modem service as an "information service" and not "cable service" within the meaning of Title VI of the Communications Act. The intent of Congress, the definition of "cable service", and the statutory construction with other provisions of law, unambiguously demonstrate that cable modem service is a "cable service" under 47 U.S.C. § 522(6).

Cross-Respondent agrees with the Cross-Petitioners that the Ninth Circuit's review of the FCC's construction of the statutory term "cable service" should have been governed by the two-part test of *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984). By choosing not to conduct a complete review under the *Chevron* standard, the Ninth Circuit failed to address the merits of the proper classification of cable modem service. (Cross-Pet. at 15.)

Moreover, Cross-Respondent supports the substance of the Cross-Petitioner's argument as they relate to the application of *Chevron* and joins all petitioners in their request that this Court engage in the appropriate *Chevron* analysis in the first instance, and not remand this case to the Ninth Circuit. This Court should rule on the substance of the proper classification of cable modem service and to consider the parties' briefs on the matter in determining this issue of exceptional public importance.

A. The FCC erred when it classified cable modem service as an "information service" and not "cable service" within the meaning of Title VI of the Communications Act, 47 U.S.C. § 522(6).

"Cable service" is defined as:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. 42 U.S.C. § 522(6).

The terms "or use" were added into the statute in 1996, and the Commission had requested comments as to whether the addition of the words "or use" expanded the category of services such that cable modem service would now fit within the definition of cable service. *Notice of Inquiry* at ¶¶ 16. Furthermore, the Commission also sought comments on how classifying cable modem service as a "cable service" would affect a local franchising authority's ability to charge a franchise fee on revenues derived from the cable operator's cable modem service. *Id.* at ¶¶ 17.

Cross-Respondent contends that cable modem service is a "cable service" as defined in 47 U.S.C. § 522(6) and that local franchising authorities may charge a franchise fee of no more than five percent of the cable operator's gross revenues, including any revenues derived from a cable operator's cable modem service and/or cable modem platform pursuant to 47 U.S.C. § 542(b).

As stated above, the 1996 amendment to 47 U.S.C. § 522(6)(b) added the words "or use" into the definition of "cable service." The Conference Committee report states that the purpose of the amendment was to "reflect the evolution of cable to include interactive services, such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[1] Clearly, the 1996 amendment, which added

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[1] H.R. Conf. Rep. No. 458, 104th Cong., 2d Ses. at 169 (1996).

"or use" was meant to include interactive and enhanced services into the definition of cable service.[2] Furthermore, "the 1996 amended definition of cable service is probably broad enough to encompass most Internet services." [3]

"Issues that hinge on the crucial definitional question [of cable service] include whether cable companies must pay franchise fees on revenues derived from providing Internet services." *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. 2703(d)*, 36 F.Supp.2d 430, 432-433 (D. Mass, 1999). Specifically, 47 U.S.C. 542(b) provides that, for any twelve-month period, "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."

One of the purposes of the revised definition of cable services was to enlarge the base of revenues upon which the cities could assess and receive franchise fees.[4] This is also supported by the statements on the House floor immediately prior to the passage of the 1996 Act, by Representative John Dingell, commenting on how the revised definition of cable services would affect local franchising authorities' revenues from cable franchise

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[2] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998.

[3] Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy.* Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][a].

[4] 142 Cong. Rec. H1145-06 (Feb. 1, 1996) (statement of Rep. Dingell).

fees, "[t]his conference agreement strengthens the ability of local governments to collect fees for the use of public rights-of-way. For example, the definition of the term 'cable service' has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees." [5]

In fact, Representative Dingell is not alone in his view that the purpose of the 1996 amendment was to broaden the definition of cable service so that municipalities could collect franchise fees on interactive services, *i.e.,* Internet via cable modem service;

- "A cable operator offering Internet as a cable service would be subject to franchising fees." [6]
- "Internet as a cable service is subject to franchising fees." [7]
- "The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require

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[5] 142 Cong. Rec. H1145-06 (Feb. 1, 1996) (statement of Rep. Dingell).

[6] Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy.* Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

[7] Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy.* Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

fee payments on a broader revenue base then that which is defined by the cable operator." [8]

- "If Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement." [9]
- The National Cable Television Association ("NCTA") has advocated that cable Internet-based services are not telecommunications services, and that the revenues gained through such services should be subject to the cable franchise fees authorized under section 622 of the Act. [10]

Without question, the 1996 Senate Conference Report and the remarks by Rep. Dingell indicate that it was Congress' intent to include cable modem service within the definition of "cable service." Thus, according to Congress, the 1996 amendment would now affect

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[8] McQuilline, Eugene, The Law of Municipal Corporations, Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

[9] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 92.

[10] *Communications Daily*, Oct. 9, 1997. (*Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 93.)

franchise fees because the definition of cable services has been expanded to include interactive services.[11]

Consistent with other changes recognizing the expansion of service offerings by cable operators, the 1996 Act also amended prior section 542(b) by inserting "to provide cable services" immediately before the period of the end of the first sentence, thus limiting the scope of the services on which cable operators must pay franchise fees with respect to any cable system to cable services only.[12] Moreover,

> Under revised section [542(b)], if Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement....The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require fee payments on a broader revenue base then that which is defined by the cable operator. [13]

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[11] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 85.

[12] 47 U.S.C. 542(b).

[13] *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p.92-93, *quoting* McQuilline, Eugene, The Law of Municipal Corporations,

Clearly, the 1996 amendment to 47 U.S.C. § 522(6)(b), which defines cable service, indicates that the purpose of the 1996 amendment, in accordance with Congress' intent, was to include access to the Internet via the cable platform into the regulatory definition of "cable service" so as to enlarge the base of revenues upon which the cities could assess and receive franchise fees pursuant to 47 U.S.C. 542(b).

B. The FCC's *Declaratory Ruling* Renders a Provision of The Internet Tax Freedom Act Meaningless.

The Internet Tax Freedom Act also reveals Congress' intent to include cable modem service as a "cable service" thereby subjecting cable modem service to franchise fees. Furthermore, the subsequent passage of the Internet Tax Freedom Act in 1998 is relevant to ascertaining the Congress' intent when it passed the 1996 amendment that added the phrase "or use" to § 522(6)(b).[14]

In 1998, two years after Congress added the phrase "or use" to § 522(6)(b), Congress passed the "Internet Tax Freedom Act".[15] The Act placed a moratorium on taxes

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Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

[14] *See, e.g., Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 840 (1988); *Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 686-88 n. 7 (1979); *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1363 (5th Cir. 1994).

[15] The Internet Tax Freedom Act, Pub.L. No. 105-277, Div. C, Title XI, §§ 1104 to 1108, Oct. 21, 1998, 112 Stat. 2681-719, *codified at* 47 U.S.C.A. § 151 note.

prohibiting any state or political subdivision from imposing a tax or fee on Internet access and electronic commerce, subject to certain exceptions. The statute further states that such a moratorium on Internet taxes "does not include any franchise fee or similar fee imposed by a State or local franchising authority pursuant to [47 U.S.C. 542(b)]." [16]

Again, 47 U.S.C. 542 states in pertinent part that a cable operator shall pay a franchise fee on the cable operator's gross revenues from the operation of the cable system to provide cable services.

Clearly, Congress believed (1) that "cable service," as defined by 47 U.S.C. § 522(6)(b), included access to the Internet over a cable system and (2) that revenues from Internet access provided by a cable service were subject to franchise fees. Consequently, Congress specifically excluded franchise fees from the Internet Tax Freedom Act, so that the right of municipalities to collect these fees would be preserved. If cable modem service was not a "cable service", then there would have been no need for Congress to refer to 47 U.S.C. 542 in the Internet Tax Freedom Act.

In the Internet Tax Freedom Act, Congress realized that a local franchising authority could charge a cable operator a franchise fee on its cable modem services (*i.e.*, Internet access). Therefore, Congress preserved the local franchising authority's right to collect such a fee and excluded the franchise fee from the moratorium on taxes relative to Internet access.

CONCLUSION

Cross-Respondent, the Utility, Cable & Telecommunications Committee of the City Council of

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[16] 47 U.S.C.A. § 151 note.

New Orleans respectfully requests that this Court grant the Conditional Cross-Petition in this docket if the Petitions for Writ of Certiorari in either 04-181 or 04-177 or both, are granted.

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No. 04-460

IN THE
Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Communications Act precludes the FCC's determination that cable modem service is not a "cable service."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the undersigned respondents state as follows:

No publicly held company owns an interest of 10% or more in NCTA, Charter Communications, Inc., Cox Communications, Inc., or Time Warner Inc.

Time Warner Inc. and Comcast Corporation, both publicly held companies, each have an interest of 10% or more in Time Warner Cable Inc.

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BRIEF IN OPPOSITION

In late August, the FCC and the United States filed a petition for a writ of certiorari (No. 04-281) seeking review of the Ninth Circuit's decision in this case, as did the undersigned cable parties (No. 04-277). Thirty days later, various municipal organizations filed what they characterize as a "conditional cross-petition." Whereas the petitions of the Government and the undersigned parties ask the Court to decide whether the Ninth Circuit erred in vacating the FCC's determination that cable modem service does not include a "telecommunications service," the Municipalities' filing asks the Court to decide whether the Ninth Circuit erred in affirming the FCC's determination that cable modem service does not constitute a "cable service." Although the Court should grant the petitions of the Government and the undersigned parties, it should deny that of the Municipalities — for three reasons.

1. The Municipalities' petition presents no question that is worthy of this Court's attention. With regard to the question raised by the Municipalities' petition (whether cable modem service constitutes a "cable service"), the Ninth Circuit's decision does not disturb the FCC's decision. The "cable service" issue therefore does not implicate the strong justification for review of lower-court decisions trumping the policy choices of agencies acting within their congressionally delegated authority.[1]

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[1] *See, e.g.*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 244 (8th ed. 2002) ("*Stern & Gressman*") ("Except where a governmental or public body is a litigant and is able to demonstrate importance in terms of the public interest it represents, an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration."); *id.* at 248 ("Particu-

In that sense, the Municipalities' petition is very different from those of the Government and the undersigned parties.

Moreover, the question that the Municipalities ask the Court to resolve is not a close one. Neither the FCC nor any court has endorsed the Municipalities' view that the statute unambiguously compels a "cable service" classification. Although a "cable service" classification was adopted by one district court,[2] it was rejected by two courts of appeals.[3] More importantly, the district court decision issued before the FCC spoke. Thus, it is unlikely that even that court would embrace a "cable service" classification again.

It is true that some of the undersigned parties argued in submissions to the FCC that the statute permits a reading under which cable modem service is simultaneously an "information service" and a "cable service," but the FCC rejected that interpretation. In the wake of the FCC's decision, the question is whether the agency's interpretation is unambiguously precluded by the statute. None of the undersigned parties has ever so argued, and, for the reasons set forth in the FCC's decision, we do not believe that it is.[4]

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larly where the Government is the petitioner, certiorari may be granted where the issues simply concern the construction of a major federal statute.") (internal quotation marks omitted).

[2] *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

[3] *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 876-77 (9th Cir. 2000); *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276-77 (11th Cir. 2000), *rev'd on other grounds sub nom. National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

[4] *See* Pet. App. in No. 04-281, at 118a-132a (¶¶ 60-69).

In particular, although the 1996 addition of "or use" to the definition of "cable service" (along with its accompanying legislative history) suggests that Congress intended some information services to be included, that amendment did not alter the requirement that there be "one-way transmission to subscribers."[5] Prior to the FCC's decision under review, the agency (with the D.C. Circuit's approval) had interpreted that phrase as requiring that the cable operator retain full control over the selection of transmitted content[6] — an interpretation that the Municipalities do not challenge. As the FCC permissibly determined, there is some such control in the case of cable modem service, but not enough to make for a "cable service."[7]

The Municipalities complain that, if the cable operator lacks content control, it must be exercised by subscribers — a conclusion that they say is inconsistent with the conclusion that cable modem service does not contain a separate "telecommunications service."[8] But the Municipalities never explain why that is so, and it is not. At most, the subscriber's exercise of control implies that there is "telecommunications" ("the transmission . . . of information of the [subscriber]'s choosing") for purposes of Section 3(43) — not that there is "telecommunications service" ("the offering of telecommunications for a fee directly to the public") for purposes of Sections 3(46).[9]

The Municipalities also rely on the Internet Tax Freedom Act's exception for "franchise fees," arguing that, if cable modem service were not a "cable service," there

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[5] *See id.* at 125a-126a (¶ 65).

[6] *See id.* at 121a-122a (¶ 62).

[7] *See id.* at 127a-131a (¶¶ 67-68).

[8] *See* Cross-Pet. 22.

[9] 47 U.S.C. §§ 153(43), (46).

would be no reason for this exception.[10] But, as the FCC correctly observed, in statutory construction, the views of a later Congress are entitled to little weight.[11] Moreover, the 1998 Congress may have included the exception to anticipate a possible agency interpretation that it viewed as permissible but not compelled.

2. The Municipalities' petition — which, as shown above, plainly is not certworthy on its own steam — becomes no more certworthy if the petitions of the FCC and the undersigned parties are granted. It is unconvincing for the Municipalities to suggest that, if the Court is going to address the regulatory classification of cable modem service anyway, it might as well place all available options before it.[12] Whereas the question whether the court of appeals erred in vacating the FCC's decision that cable modem service does not include a "telecommunications service" component is clearly worthy of this Court's attention, the question whether the court of appeals correctly affirmed the FCC's decision that cable modem service does not constitute a "cable service" is not, for the reasons set out above. It is not this Court's practice, once it has granted certiorari on one question, to sweep in all questions presented in the same case, whether independently certworthy or not.

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[10] *See* Cross-Pet. 10, 19.

[11] *See* Pet. App. in No. 04-281, at 131a-132a (¶ 69).

[12] *See, e.g.*, Cross-Pet. 13 ("the Court should grant review with all of the potential cable modem service classifications — 'information service,' 'cable service,' and 'telecommunication service' — before it").

Moreover, contrary to the Municipalities' suggestion,[13] their petition does not implicate the subsidiary issue raised in the initial petitions — whether the court of appeals erred in allowing *stare decisis* to prevail over the *Chevron* framework. The court of appeals' prior *Portland* precedent held that "cable service," when interpreted without *Chevron* deference, does not encompass cable modem service. After *Portland*, the FCC likewise determined that "cable service" does not encompass cable modem service. Plainly, then, if the court of appeals in the decision below had extended *Chevron* deference, it would have affirmed: it would not have found "unreasonable" a decision on all fours with its own precedent.

Nor can the Municipalities credibly argue that, if the Court grants the initial petitions, it can resolve the question presented in the Municipalities' petition without additional effort. As the Municipalities themselves point out, when a service is an "information service," it may or may not also be a "cable service."[14] Thus, agreeing with the initial petitioners that cable modem service is an "information service" without a separate "telecommunications service" component does not imply any answer to the question whether cable modem service is also a "cable

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[13] *See, e.g.*, Cross-Pet. 3 ("the Court's review is particularly appropriate here because, absent such review, this important question would be decided nationwide by the Ninth Circuit's decision based solely on what that court perceived as the *stare decisis* effect of its prior decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2002), without any meaningful judicial review of the merits of the arguments for the various possible classifications of cable modem service").

[14] *See* Cross-Pet. 6 ("unlike the 'information service' and 'telecommunications service' alternatives, the 'information service' and 'cable service' alternatives are not mutually exclusive").

service." That is a separate question, and it is not certworthy.

3. Finally, the Municipalities' filing improperly invokes Rule 12.5's 30-day grace period. Before this Court created that grace period by amending its rules in 1980, its absence "created problems for a party who did not want to petition or appeal unless his opponent did, usually because he had prevailed on the point or points most significant to him."[15] To be safe, such a party was compelled to file a possibly pointless petition on day 90, only to withdraw it later if the other side had not filed.[16] To obviate this waste of time and effort, the Court allowed 30 extra days to "a respondent seeking to file a conditional cross-petition."[17]

Rule 12.5 was thus designed to benefit petitioners who partially won and partially lost below and who are "willing to let stand the portion of the decision below that is adverse so long as the favorable portion of the decision is not overturned."[18] Nothing in the Municipalities' petition suggests that they fall in that category: there is no indication that they prefer the Ninth Circuit's "information service with telecommunications service component" classification over the "information service only" classification

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[15] *Stern & Gressman* 443.

[16] *See id.*

[17] Sup. Ct. R. 12.5; *see Stern & Gressman* 443 ("The new rule serves the purpose of, and obviates the need for, filing a conditional cross-petition that requested a granting of the writ only if the opposing petition was granted."); Bennett Boskeya & Eugene Gressman, *The Supreme Court's New Rules for the Eighties*, 85 F.R.D. 487, 504 (1980) ("Counsel who does not wish to appeal or petition for certiorari unless the other party does so may now wait and see what the other party actually does, and then act accordingly.").

[18] *Stern & Gressman* 443.

urged in the initial petitions. The Municipalities have not opposed those petitions and apparently urge the Court to grant them.[19]

Although Rule 12.5 can be read to permit any respondent — even one on the same side of the case as the initial petitioner — to take advantage of the 30-day grace period simply by labeling a filing a "conditional cross-petition,"[20] such filings add unjustified and pointless delay.[21] The Court can and should signal its disapproval by denying certiorari.

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[19] *See* Cross-Pet. at 3 ("Cross-Petitioners agree with the Federal Communications Commission and the United States ('Federal Petitioners') and the petitioners in No. 04-277 ('NCTA Petitioners') that the classification of cable modem service under the Communications Act presents an issue of exceptional importance worthy of this Court's review."); *id.* at 14 ("The Federal Petitioners and the NCTA Petitioners . . . request that this Court engage in [*Chevron*] analysis in the first instance. Cross-Petitioners join these petitioners in this sentiment.").

[20] *See Stern & Gressman* 443 ("Although one usually thinks of a cross-petition as opposing the position of the initial petitioner, the rules, read literally, do not contain any such limitation."); *but cf. Holtz v. Smith*, 519 U.S. 1038, 1038 (1996) ("The motion to treat an untimely petition for a writ of certiorari as a conditional cross-petition for a writ of certiorari is denied.").

[21] *See* Sup. Ct. R. 15.7 ("If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.").

CONCLUSION

The petition for a writ of certiorari in No. 04-460 should be denied.

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No. 04-460

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission permissibly determined not to regulate cable modem service as a "cable service" under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (04-281 Pet. App. 1a-39a) is reported at 345 F.3d 1120. The declaratory ruling and notice of proposed rulemaking of the Federal Communications Commission (04-281 Pet. App. 40a-203a) is reported at 17 F.C.C.R. 4798.

JURISDICTION

The petitions for a writ of certiorari in No. 04-281 and No. 04-277 were filed on August 27 and 30, 2004, respectively. The conditional cross-petition was filed on September 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Cable modem service consists of the provision of high-speed (or "broadband") Internet access to subscribers through cable television facilities that have been modified to provide that additional service. On March 15, 2002, the Federal Communications Commission issued a Declaratory Ruling in which the agency determined that cable modem service is an information service under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, with no separately regulated telecommunications service component. In the course of its decision, the FCC also determined that cable modem service is not a cable service subject to regulation under Title VI of the Act, 47 U.S.C. 521-573. In reviewing the FCC's decision, the court of appeals relied on one of its own prior decisions, reached before the FCC had acted, to vacate the FCC's classification of cable modem service as purely an information service and to hold that cable modem service does have a separately regulated telecommunications service component. Also relying on its own prior decision, the court of appeals affirmed the FCC's determination that cable modem service is not a "cable service" under the Act.

The petitions for a writ of certiorari in Nos. 04-277 and 04-281 seek review of the court of appeals' determination that cable modem service has a separate component that is a telecommunications service under the Act. The instant cross-petition seeks review of the court of appeals' determination that cable modem service is not a "cable service" under the Act.

1. The Communications Act defines a "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service,

and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. 522(6). Video programming is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. 522(20), whereas "other programming service" is "information that a cable operator makes available to all subscribers generally," 47 U.S.C. 522(14).

a. The FCC concluded that cable modem service is not a cable service under 47 U.S.C. 522(6) for two broad reasons. First, the FCC explained that cable modem service does not satisfy the requirement of section 522(6)(A) that cable service involve a "one-way transmission to subscribers." 04-281 Pet. App. 120a. When Congress enacted 47 U.S.C. 522(6)(A) in 1984, cable operators had begun developing the capability to provide various types of "two-way" communications services (including common carrier services) over their cable systems, in addition to the "one-way" delivery of video programming that has traditionally characterized cable television service. Pub. L. No. 98-549, § 2, 98 Stat. 2780. Congress intended to subject only the latter one-way services to regulation under Title VI. Congress accordingly specified in 47 U.S.C. 522(6)(A) that cable service involves a "one-way transmission to subscribers," in order to distinguish between traditional cable services involving the "same package or packages of video programming transmitted from the cable operator * * * to all subscribers," 04-281 Pet. App. 120a, and other types of communications services that could be offered using a cable network. In subsequent decisions applying the statutory definition of cable service, the FCC interpreted the requirement of a "one-way transmission" as

requiring the cable operator to participate actively in the selection and distribution of video programming, *id.* at 121a, an interpretation of the Act that the D.C. Circuit has upheld as reasonable. See *National Cable Television Ass'n* v. *FCC*, 33 F.3d 66, 73 (1994) (*NCTA*).

Based on the record evidence before it, the FCC concluded in the declaratory ruling at issue in this case that cable operators offering cable modem service are not "in control of selecting and distributing content to subscribers." 04-281 Pet. App. 127a. The FCC explained that cable modem service allows subscribers "to define searches for information throughout the World Wide Web, query web sites for information, engage in transactions, receive individually tailored responses to their requests, generate their own information, and exchange e-mail," among other things. *Id.* at 127a-128a. Thus, the FCC concluded, "ultimate control of the [Internet] experience lies with the subscriber" and "the information received by the subscriber is tailored to that subscriber's interests." *Id.* at 129a. Although the FCC observed that some cable operators provide subscribers "proprietary information or packages of pre-selected web site links," *id.* at 130a, the Commission concluded that the fact that "discrete parts of cable modem service have characteristics of cable service * * * does not require classification of the service as a cable service when it is predominantly Internet access." *Ibid.* Under the "one-way transmission to subscribers" requirement, the fact that "the majority of the information accessed over the Internet is chosen individually by the Internet user without the involvement of the cable operator" is sufficient to support the FCC's conclusion that cable modem service is not a "cable service" under the Act. *Id.* at 129a.

The FCC also concluded that cable modem service is not a cable service because it does not satisfy the requirement of 47 U.S.C. 522(6)(A)(ii) for an "other programming service," which is defined as "information that a cable operator makes available to all subscribers generally." See 47 U.S.C. 522(14).[1] Under that definition, the FCC found that "other programming service" includes "non-video information having the characteristics of traditional video programming." 04-281 Pet. App. 123a (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 41-42 (1984)) (internal quotation marks omitted). In contrast, the FCC stated, information that is "subscriber specific," such as the information that a cable modem subscriber might choose to retrieve from the Internet, does not satisfy the condition in the definition of "other programming service" that the information must be made available "to all subscribers generally." *Ibid.*

b. The FCC rejected arguments that 47 U.S.C. 522(6)(B)—and particularly Congress's addition in 1996 of the term "or use" in Section 522(6)(B)—compels classification of cable modem service as a cable service. The FCC explained (04-281 Pet. App. 123a-125a) that cable modem service (had it existed at the time) clearly would have fallen outside of the pre-1996 definition of cable service, and that neither the text of the 1996 amendment nor its legislative history establishes that Congress intended the amendment to bring a service like cable modem service within the reach of the statute. *Id.* at 125a. As the FCC noted, "subscriber interaction is not a necessary component of cable service," as demon-

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[1] The FCC noted that there was general agreement among commenters—not challenged by cross-petitioners here—that cable modem service is not "video programming" under 47 U.S.C. 522(6)(A)(i). 04-281 Pet. App. 122a-123a.

strated by the term "if any" in 47 U.S.C. 522(6)(B). Pet. App. 126a (quoting *NCTA*, 33 F.3d at 72) (internal punctuation omitted). Thus, the FCC explained, if a service offered by a cable operator does not satisfy the "one-way transmission" requirement in 47 U.S.C. 522(6)(A), it cannot become a cable service merely because "subscriber interaction [is] required" for the "use" of that service under 47 U.S.C. 522(6)(B). Pet. App. 125a-126a ("The [1996] amendment itself addresses only the use of content *otherwise qualifying as cable service*.") (emphasis added).

Finally, the FCC rejected arguments that the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Tit. XI, §§ 1100-1104, 112 Stat. 2681-719 to 2681-726, reveals any congressional intent regarding the classification of cable modem service as a cable service under the Communications Act. 04-281 Pet. App. 131a. The Internet Tax Freedom Act prohibits certain state and local taxes on Internet access services, § 1101(a), 112 Stat. 2681-719, but specifically exempts franchise fees for cable services from the definition of taxes, § 1104(8)(B), 112 Stat. 2681-726. Noting at the outset that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," 04-281 Pet. App. 132a (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)), the FCC concluded that, in any event, the 1998 exception for cable franchise fees did not indicate a congressional intent to address the scope of the definition of "cable service" in the Communications Act, but only clarified that franchise fees are outside the reach of the Internet Tax Freedom Act, *ibid.*

2. Petitions for review of the FCC's declaratory ruling classifying cable modem service were filed in the Third, Ninth, and D.C. Circuits. A judicial lottery

conducted under 28 U.S.C. 2112(a)(3) selected the Ninth Circuit to review the agency's decision. In responding to cross-petitioners' argument that cable modem service is a cable service under the Communications Act, the court of appeals explained that, in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000), it had rejected that argument on the basis that "[t]he essence of cable service * * * is one-way transmission of programming to subscribers generally," while the "salient characteristics" of cable modem service "are not one-way and general, but interactive and individual." 04-281 Pet. App. 13a (internal quotation marks omitted) (quoting *Portland*, 216 F.3d at 876). Concluding that *Portland* was binding circuit precedent, the court of appeals in this case affirmed the FCC's determination not to regulate cable modem service as a cable service under Title VI of the Act. 04-281 Pet. App. 21a-22a.

ARGUMENT

Unlike the petitions in Nos. 04-277 and 04-281, this cross-petition does not involve a reviewing court's rejection of the expert federal agency's reasonable interpretation of its governing statute. Instead, the court of appeals *upheld* the FCC's determination that cable modem service is not a "cable service" under the Communications Act. The Ninth Circuit's decision concerning the definition of cable service does not conflict with any decision of any other court of appeals or of this Court, and the question whether the Ninth Circuit erred in refusing to conduct *Chevron* analysis—which is squarely presented in Nos. 04-277 and 04-281—is not well framed here. Nor would grant of the cross-petition aid the Court's resolution of the issues presented in those other petitions. The cross-petition for a writ of certiorari should therefore be denied.

1. The government and the cable interests have filed petitions for writs of certiorari in Nos. 04-277 and 04-281 seeking review of the court of appeals' decision that cable modem service is partly an information service and partly a telecommunications service under the Communications Act. Cross-petitioners elected not to file a stand-alone petition to challenge the court of appeals' decision that cable modem service is not a cable service, and they do not contend that their cross-petition would have been worthy of a grant of certiorari had it been filed on a stand-alone basis. They nonetheless suggest (Cross-Pet. 4, 13) that, if the Court grants the petitions in Nos. 04-277 and 04-281, it should also evaluate the merits of cross-petitioners' arguments in favor of the cable service classification. That suggestion is unfounded for several reasons.

First, the court of appeals affirmed the FCC's decision that cable modem service is not a cable service, and there is no conflict of authority within the circuits on that point. The Eleventh Circuit is the only court of appeals other than the Ninth Circuit to have considered whether the cable service definition applies to cable modem service, and, in agreement with the FCC and the Ninth Circuit, the Eleventh Circuit concluded that cable modem service is not a cable service. *Gulf Power Co.* v. *FCC*, 208 F.3d 1263, 1276-1277 (11th Cir. 2000), rev'd on other grounds, 534 U.S. 327 (2002). Only one district court has adopted cross-petitioners' view that cable modem service is a cable service. See *MediaOne Group, Inc.* v. *County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000).[2] On review of that district court decision, the

[2] At least one other district court has followed the FCC's decision that cable modem service is not a cable service under the Act. See *Parish of Jefferson* v. *Cox Communications La., LLC*, No. Civ. A 02-

Fourth Circuit declined to adopt the district court's classification of cable modem service and affirmed on different grounds. *MediaOne Group, Inc.* v. *County of Henrico*, 257 F.3d 356 (4th Cir. 2001). Moreover, because the court of appeals' decision upholds the FCC's implementation of the Communications Act with respect to the reach of Title VI requirements, the cross-petition does not present a situation in which important federal policies established by the political Branches have been thwarted by non-deferential judicial review.

Second, cross-petitioners argue (Cross-Pet. 14) that the relationship between *Chevron* analysis and circuit precedent is a question that this Court should resolve. The Court can fully address that question, however, by granting the petitions for certiorari in Nos. 04-277 and 04-281. Grant of the cross-petition would not substantially aid the Court's resolution of the *Chevron* question. Indeed, cross-petitioners' principal argument is that *Chevron* deference is *not* appropriate because, in their view, "Congress spoke so comprehensively on the 'cable service' definition." Cross-Pet. 16. Cross-petitioners, therefore, are poorly positioned to defend the principle that a court of appeals should apply *Chevron* in reviewing a responsible agency's interpretation of ambiguous statutory provisions, notwithstanding the existence of circuit precedent addressing the same language.[3]

3344, 2003 WL 21634440, at *6 (E.D. La. July 3, 2003).

[3] It is also unpersuasive for cross-petitioners to argue (Cross-Pet. 24) that the court of appeals' decision to affirm the FCC's conclusion that cable modem service is not a cable service contravenes *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), by affirming the agency on grounds different from those the agency itself adopted. First, the FCC's reasons for concluding that cable modem service is not a cable service

Third, the Court can resolve the question raised in Nos. 04-277 and 04-281—whether the FCC permissibly determined that cable modem service does not include a separate telecommunications service component—without undertaking the entirely separate analysis that would be required to address cross-petitioners' arguments relating to the cable service definition. The permissibility of the FCC's classification of cable modem service as purely an information service, rather than partly an information service and partly a telecommunications service, turns on the definitions of "information service" and "telecommunications service" contained in 47 U.S.C. 153 and the FCC's decisions concerning the relationship between those two categories of service. In contrast, cross-petitioners' arguments regarding the definition of cable service are grounded in Title VI of the Communications Act and an entirely different set of FCC decisions and background materials relating to the definitions in 47 U.S.C. 522. See Cross-Pet. 16-20. Moreover, cross-petitioners do not argue that classifying cable modem service as a cable service would prevent the FCC from classifying it as an

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are consistent with the court of appeals' reasoning in *Portland*, which the Ninth Circuit applied here. Compare 04-281 Pet. App. 122a (emphasizing the statutory requirement of a one-way transmission) with *Portland*, 216 F.3d at 876-877 (same). Furthermore, cross-petitioners' suggestion (Cross-Pet. 23) that the court of appeals in this case could have followed *Chenery* after concluding that it was bound by *Portland* makes no sense. The Ninth Circuit's decision to follow its circuit precedent meant that it was not engaging in the sort of review of the agency's reasoning under the Administrative Procedure Act that would trigger *Chenery*. Lastly, cross-petitioners' *Chenery* argument involves no more than applying the settled law stated in *Chenery* (which the Ninth Circuit did not even consider because of its reliance on circuit precedent) to particular facts.

information service as well (see Cross-Pet. 6, 12), and nothing in the Act indicates that those two regulatory categories are inherently inconsistent. Therefore, upholding the FCC's conclusion that cable modem service does not contain a separate telecommunications service component would not require this Court to consider the correctness of the agency's decision that cable modem service is not a cable service.

2. In any event, cross-petitioners' argument (Cross-Pet. 16-20) that the definition of cable service unambiguously encompasses cable modem service is untenable. It is settled law that, when a cable operator offers "video programming" under 47 U.S.C. 522(6)(A)(i), the requirement of a "one-way transmission to subscribers" in the definition of cable service requires the cable operator to participate actively in the selection and distribution of that programming. See *NCTA*, 33 F.3d at 73. Cross-petitioners do not challenge the FCC's determination that the requirement of active participation applies equally to "other programming services" under 47 U.S.C. 522(6)(A)(ii). They also do not allege that the cable operator actively participates in the selection of content that cable modem subscribers receive from the Internet, or challenge the FCC's undisputed determination that "the majority of the information accessed over the Internet is chosen individually by the Internet user." 04-281 Pet. App. 129a. Yet cross-petitioners contend that cable modem services are "other programming services" because Internet access service constitutes "information that a cable operator makes available to all subscribers generally." Cross-Pet. 18 (citing 47 U.S.C. 522(14)). The FCC reasonably rejected that argument, concluding that information is not made available generally to subscribers when the particular information

that subscribers receive depends on their individual Internet queries and on-line activities. 04-281 Pet. App. 127a-128a.

Cross-petitioners respond (Cross-Pet. 18) that cable modem service provides all subscribers with access to the same information on the Internet. That is incorrect. Internet information to which one cable modem subscriber obtains access (*e.g.*, on-line banking information and personal e-mails) may be unavailable to other subscribers of the same cable modem service. It is ultimately the subscriber, not the cable operator, who selects the information to be retrieved. Moreover, contrary to cross-petitioners' suggestion (Cross-Pet. 21-22), neither a cable operator's provision of certain content to its cable modem subscribers, nor any technical ability to block subscribers' access to certain content on the Internet, requires that cable modem service as a whole be classified as a cable service. As the FCC concluded, cable modem service is "built around Internet access," 04-281 Pet. App. 127a, and the fact that the cable operator may take steps to make Internet access "easier, faster, and more convenient" does not remove "ultimate control" of the Internet experience from the subscriber. *Id. at* 129a.[4]

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[4] Cross-petitioners likewise are incorrect in their suggestion (Cross-Pet. 22) that cable modem service must be a telecommunications service unless the cable operator exercises editorial control over the information that subscribers receive. Cable modem service, like all Internet access services, permits a subscriber to "retriev[e] * * * information via telecommunications." 47 U.S.C. 153(20) (defining information services). As explained in the government's petition in No. 04-281 (at 16-19), subscribers can access the cable operator's information services through "telecommunications" without acquiring a "telecommunications service" from the cable operator.

The FCC also reasonably concluded that Congress's addition in 1996 of the term "or use" to part (B) of the definition of cable service (47 U.S.C. 522(6)(B)) was not intended, as cross-petitioners suggest (Cross-Pet. 12, 17), to sweep all information services provided by cable operators into Title VI of the Communications Act. Cross-petitioners rely heavily on a statement in the conference report on the 1996 amendment that the amendment "reflect[ed] the evolution of cable to include interactive services" such as "information services" and "enhanced services." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 169 (1996). But as the FCC explained in its declaratory ruling (04-281 Pet. App. 127a), the language of the 1996 amendment itself, while contemplating the provision of "interactivity associated with both video and other programming services," did not reflect an intent to expand the definition of cable service to encompass *all* information services provided by cable operators. Rather, Congress left intact, as an independent element of the "cable service" definition, the long-standing requirement of a "one-way transmission to subscribers" that cable modem service fails to satisfy. *Ibid.*

Finally, cross-petitioners' reliance (Cross-Pet. 19) on the Internet Tax Freedom Act's exception for "franchise fees" is misplaced. As the FCC observed, nothing in this 1998 statute purports to speak to the Communications Act's definition of cable service or the proper interpretation of the 1996 amendment to that definition. 04-281 Pet. App. 132a. Nor is the franchise fees exception "meaningless surplusage" (Cross-Pet. 19); because the Internet Tax Freedom Act was enacted before the FCC had classified cable modem service under the Communications Act, Congress may well have decided to

include the exception out of an abundance of caution. See, e.g., *Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 646 (1990) ("It might reasonably be argued, of course, that these two exceptions are indeed technically unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)."). In short, the Internet Tax Freedom Act does not support cross-petitioners' challenge to the reasonableness of the FCC's resolution of the ambiguity in the Communications Act's definition of cable service.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, *et al.*,

Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENTS EARTHLINK, INC., BRAND X INTERNET SERVICES, AND CENTER FOR DIGITAL DEMOCRACY

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QUESTION PRESENTED

Whether the definition of "cable service"—"(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service"—includes cable modem service. 47 U.S.C. § 522(6).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

I. EarthLink, Inc. is a publicly traded company engaged primarily in the business of providing Internet access and related value-added services to business and residential customers nationwide. EarthLink, Inc. has no parent company and no wholly-owned subsidiaries.

Sprint Corporation is a publicly traded corporation that has an ownership share in EarthLink, Inc. equal to or in excess of 10 percent. There are no other publicly traded companies that have ownership shares in EarthLink, Inc. of 10 percent or greater.

II. Brand X Internet Services is a privately held company, incorporated in California. It has no parent or subsidiaries.

III. Center for Digital Democracy is a not-for-profit corporation incorporated in the District of Columbia.

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On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENTS EARTHLINK, INC., BRAND X INTERNET SERVICES, AND CENTER FOR DIGITAL DEMOCRACY

On September 30, 2004, EarthLink, Inc. ("EarthLink"), and Brand X Internet Services ("Brand X") joined by Center for Digital Democracy, filed their respective opposition briefs responding to the petitions filed by the United States and the Federal Communications Commission ("FCC" or the "Commission") and the National Cable and Telecommunications Association ("NCTA") in Case Nos. 04-281 and 04-277. As EarthLink and Brand X there argued, although the issues presented are important, those issues have been conclusively

decided by Congress, and there is no reason for this Court to hear the case. The conditional cross-petition filed by the National League of Cities and others (hereinafter "League of Cities Cross-Petition") similarly raises no issue worthy of this Court's attention. Accordingly, all of the petitions should be denied.

STATEMENT OF THE CASE

EarthLink's Counter-Statement appears at pages 2-12 of its September 30, 2004, Opposition Brief in Case Nos. 04-277 and 04-281, and EarthLink, Brand X, and Center for Digital Democracy incorporate that Counter-Statement here. The court of appeals' discussion relevant to the issues raised by the League of Cities' Cross-Petition is reproduced at FCC Pet. App. at 7a-8a n.6, 13a, 21a. The Commission's discussion of those issues in the Declaratory Ruling that was reviewed by the Ninth Circuit is reproduced at FCC Pet. App. at 118a-132a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

The League of Cities urges that the statutory language is clear that "cable modem service" (the term the FCC has used to describe the bundled service consisting of Internet access service and cable-based transmission of that service, *see* FCC Pet. App. at 86a) is a "cable service" under the Communications Act. The Communications Act defines cable service" as: "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6).[1] More spe-

[1] Section 602 of the Communications Act, 47 U.S.C. § 522, defines the terms there listed "[f]or purposes of this title," that is, Title VI. Section 3 of the Act, which defines terms "[f]or purposes of this Act . . . ," states that "the term 'cable service' has the meaning given such term in section

cifically, the League of Cities argues that cable modem service fits the definition of "other programming service" under 47 U.S.C. § 522(14). *See* League of Cities Cross-Petition at 16-19.[2] The Act defines "other programming service" as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The League of Cities is incorrect.

I. THE CROSS-PETITION IGNORES THE "ONE-WAY TRANSMISSION" LANGUAGE IN THE DEFINITION OF "CABLE SERVICE."

Despite the fact that the League of Cities' primary argument is that the plain language of the statute compels the result that cable modem service is a "cable service," the League of Cities never explains how the "one-way" requirement of the Act's "cable service" definition can be squared with the reality of Internet access service, which enables the sending and receiving of information between or among two or more points and parties. As the per curiam panel in *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), held in describing the decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), "we concluded that 'the definition does not fit' cable modem service, whose salient characteristics are 'not one-way and general, but interactive and individual.'" FCC Pet. App. at 13a.

Instead of discussing the statutory language that it claims plainly supports its position, the League of Cities relies almost entirely on legislative history. *See* League of Cities Cross-Petition at 5, 10, 18. The Commission below, how-

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602." 47 U.S.C. § 153(7). The section 3 definition of "cable service" was added in 1996.

[2] It bears noting that even the cable companies, which had assumed that cable modem service was a "cable service" prior to the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), have abandoned the argument that cable modem service is a "cable service."

ever, properly held that a single line of legislative history cannot trump the language of the law that was enacted:

> If Congress intended by the language in the Joint Explanatory Statement to broaden the meaning of cable services to include stand-alone "information services" as defined in the 1996 Act or "enhanced services" as that term has traditionally been defined, the language of the statute itself does not reflect this intent.

FCC Pet. App. at 127a.

The legislative history cited by the League of Cities dealt with the addition of the words "or use" to section 602(6)(B) of the Communications Act, 47 U.S.C. § 522(6)(B). As the Commission properly noted in its Declaratory Ruling:

> The amendment itself addresses only the use of content otherwise qualifying as cable service. As the D.C. Circuit has pointed out, the subsection of the definition permitting subscriber interaction is qualified by the term "if any," implying that "subscriber interaction . . . is not a necessary component of cable service." Cable service continues to be defined as "the one-way transmission to subscribers," and both video programming and other programming services remain subject to this limitation.

FCC Pet. App. at 125a-126a (footnotes omitted). In light of that statement, the League of Cities is also incorrect in claiming that "[t]he Commission did not address the plain, and broad, meaning of the phrase, 'or use.'" League of Cities Cross-Petition at 10.

In addition to ignoring the words that are in the statute ("one-way transmission"), the League of Cities also seeks to add words that are not there. The League of Cities' central argument is that cable modem service is an "other programming service" within the meaning of the Communications Act. *See* League of Cities Cross-Petition at 18. The League of Cities properly quotes the definition of "other programming service" as meaning "information that a cable

operator makes available to all subscribers generally." *Id.*[3] However, on at least two other occasions in its cross-petition, the League of Cities suggests through misleading quotations that the word "information" in that definition instead reads "information service." On page 6 of its cross-petition, the League of Cities states that:

> To the contrary, "cable service" includes any "information service" that "a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14) . . . .

The combination of placing the term "information service" in quotes and citing without signal or explanation to the definition of "other programming service" appears calculated to suggest that the phrase "information service" appears in the definition of "other programming service." It does not. This error is compounded by the fact that "information service" is itself a defined term under the Communications Act, 47 U.S.C. § 153(20), and one of particular relevance to the issue in Case Nos. 04-277 and 04-281. The League of Cities repeats the error on page 12 of the cross-petition:

> Indeed, as a result of the 1996 amendment expanding the "cable service" definition, cable modem service is a "cable service" precisely because it is an "information service" that a "cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14) . . . .[4]

Much as the FCC and the NCTA in their petitions urge a reading of the term "telecommunications service" that can

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[3] The "one-way transmission" requirement of the definition of "cable service" applies to both "video programming" and "other programming service." *See* 47 U.S.C. § 522(6); *see also* FCC Pet. App at 122a-123a, 126a.

[4] A similar error, albeit without a direct citation to the statute, occurs on page 17, where the League of Cities states that: "Those rules of construction point clearly to the conclusion that Congress intended 'cable service' to include all 'information services' made available to subscribers generally over a cable system, meaning that cable modem service is a 'cable service.'"

only be supported if they add words to the statute, the League of Cities here offers a "plain meaning" argument that relies on words not in the statute. That improper reliance removes the entire basis for the cross-petition.

II. BOTH *PORTLAND* AND THE COMMISSION'S DECLARATORY RULING ADDRESSED THE "ONE-WAY" LANGUAGE OF THE DEFINITION OF "CABLE SERVICE."

The League of Cities' second ground for granting the cross-petition is that "[t]he court of appeals should not have relied on the rationale of *Portland* to affirm the *Declaratory Ruling's* 'cable service' conclusion because the Commission did not rely at all on *Portland's* rationale in reaching that result." League of Cities Cross-Petition at 23. To be sure, the Commission kept its distance from *Portland*, but that does not mean that "the *Declaratory Ruling* relied on different reasoning than *Portland* . . . ." *Id.* at 24.

Part of the Commission's discussion of the "one-way" language in the Declaratory Ruling is as follows:

> 61. *One-Way Transmission to Subscribers.* The phrase "one-way transmission to subscribers" in the definition reflects the traditional view of cable as primarily a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers. When the definition was enacted in 1984, cable systems designed for the traditional one-way delivery of programming were developing the capability to provide "'two-way' services, such as the transmission of voice and data traffic, and transactional services such as at-home shopping and banking." The legislative history indicates that Congress intended the cable service definition "to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under section 621(c) and all other communications services that could be provided over a

> cable system." Thus, the definition reflected the traditional view that the one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity and should not be regulated as such.

FCC Pet. App. at 120a (footnotes omitted). That discussion continues at FCC Pet. App. at 121a-125a.

The *Portland* court had this to say about the same topic:

> The Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). For the purposes of this definition, "video programming" means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The essence of cable service, therefore, is one-way transmission of programming to subscribers generally.
>
> This definition does not fit @Home. Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable

> channels is one thing; surfing the Internet over a cable broadband connection is quite another.

Portland, 216 F.3d at 876-877.

A side-by-side comparison of what the court said in *Portland* and what the Commission said in its Declaratory Ruling demonstrates that the reasoning of the two bodies regarding the definition of "cable service" is in fact the same. Moreover, both the *Portland* court and the Commission cited with favor *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), in their discussions of why cable modem service is not a "cable service." *See Portland*, 216 F.3d at 877, *and* FCC Pet. App. at 121a. Accordingly, the League of Cities' contention that the *Brand X* court upheld the Commission on an impermissible basis with respect to the "cable service" issue is both factually and legally incorrect.

CONCLUSION

Neither of the two original petitions raises any issue that requires this Court's attention. Accordingly, there is no need to evaluate the cross-petition in detail. Even if one or both of the original petitions were granted, however, the cross-petition raises no issue that meets this Court's standards for certiorari. The cross-petition should be denied.

Respectfully submitted,

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(6)

No. 04-460

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES,
Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MISCELLANEOUS

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (8th ed. 2002) 5

No. 04-460

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES,

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REPLY BRIEF OF CROSS PETITIONERS

Cross-Petitioners submit this reply to the briefs in opposition of the Federal Respondents ("FCC Opp."), NCTA, *et al.* ("NCTA Opp."), and Earthlink *et al.* ("Earthlink Opp.").[1]

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[1] Federal Respondents' petition for writ of certiorari in No. 04-281 will be cited as "FCC Pet." The Appendix to that petition will be cited as "FCC App." The petition for writ of certiorari in No. 04-277, filed by NCTA, will be cited as "NCTA Pet."

I. If, as the Petition in No. 04-281 Correctly Contends, the Classification of Cable Modem Service Presents an Issue of Exceptional National Importance, Then the Cross Petition Does As Well.

In their petition in No. 04-281, Federal Respondents urged this Court to grant review because, *inter alia*, "the classification of cable modem service under the Communications Act presents an issue of exceptional national importance." FCC Pet. at 24. We agree. Cross Petition at 3. It is undisputed that one of those potential classifications -- explicitly recognized by this Court in the *Gulf Power* case,[2] by the Commission in its proceeding that culminated in this case,[3] by the Federal Respondents in No. 04-281 (FCC Pet. at 5-7), and by the cable petitioners in No. 04-277 (NCTA Pet. at 4) -- is that cable modem service is a "cable service" within the meaning of the Communications Act, 47 U.S.C. §§153(7) & 522(6). Federal Respondents cannot tenably claim that the classification issue is sufficiently important to justify review only if it is resolved the way they prefer. Review of the Cross Petition is therefore warranted.

1. Federal Respondents argue that there is no conflict among the circuits on the "cable service" issue warranting this Court's review (FCC Opp. at 8-9). But Federal Respondents' claim of a circuit conflict in their own petition

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[2] *NCTA v. Gulf Power*, 534 U.S. 327, 337-339 (2002); *id.* at 349-350 & n. 1 (Thomas & Souter, JJ, concurring in part and dissenting in part).

[3] *Internet over Cable*, Notice of Inquiry, 15 FCC Rcd 19287, 19293-294 (2000); *Internet over Cable*, Declaratory Ruling, 17 FCC Rcd 4798, 4818-39 (2002) ("*Declaratory Ruling*") (FCC App. at 86a-132a).

(FCC Pet. at 20-21) is itself weak,[4] and their petition is certainly not based solely, or even primarily, on that claim (FCC Pet. at 2-3, 15-19 & 24-28).

In any event, a circuit conflict is hardly the only justification for this Court's review. To the contrary, "an important question of federal law that has not been, but should be, settled by this Court" is grounds for review, Sup. Ct. Rule 10(c), and Federal Respondents have argued, and we agree, that the proper "classification of cable modem service under the Communications Act" is just such a question (FCC Pet. at 24). The "cable service" question is one over which the court of appeals below and a district court are in conflict.[5] More importantly, this conflict is the same one that two members of this Court noted in *Gulf Power*,[6] and the cable modem service classification question itself, including the possibility that cable modem service is a "cable service," was acknowledged by all members of the Court in *Gulf Power*.[7]

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[4] *See, e.g.*, Opposition Brief of Respondent Earthlink, Nos. 04-277 & 04-281, at 25-26; Brief of States and Consumer Groups in Opposition, Nos. 04-277 & 04-281, at 28-29.

[5] FCC Pet. at 10 & n.3; NCTA Pet. at 7-10; FCC Opp. at 8; Cross Petition at 7. *Cf. Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (certiorari granted because of "the importance of the questions presented and the conflicting views in the courts of appeals and the district courts").

[6] *Gulf Power*, 534 U.S. at 349-50 & nn. 1&2 (Thomas & Souter, JJ, concurring in part and dissenting in part).

[7] *Id.* at 337-38 (opinion of the Court).

2. Federal Respondents' argument (FCC Opp. at 9-10) that the Court can address the question concerning the interplay of *Chevron*[8] and *stare decisis* without granting the Cross Petition is misguided. The argument might make more sense if in their petition, Federal Respondents had asked the Court to address only the *stare decisis* issue and, assuming the Court were to agree that *Chevron* rather than *stare decisis* controls, left application of the *Chevron* standard for remand to the court of appeals. But that is not what Federal Respondents have done. They have instead asked the Court to apply the *Chevron* standard in the first instance to the Commission's *Declaratory Ruling* that is the subject of this case. FCC Pet. at I, 15-19 & 24-28; NCTA Pet. at i, 17-21. If the Court is to apply *Chevron* in the first instance, and if *Chevron* is not a rubber-stamp invariably requiring a court to affirm all agency determinations (which it clearly is not), then Cross Petitioners, just as much as the Federal Respondents, are entitled to have their arguments concerning the propriety of the *Declaratory Ruling*'s resolution of the cable modem service classification issue reviewed under the *Chevron* standard.

That is especially true here where the court of appeals' decision with respect to the "cable service" classification suffers from precisely the same defects about which Federal Respondents complain in their petition: (1) the court of appeals decision rejected the "cable service" classification, just as it did the "information service" classification, based solely on what it perceived as the *stare decisis* effect of *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (FCC App. at 16a-22a); and (2) *Portland*, in turn, ruled on the "cable

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[8] *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984).

service" issue, just as it ruled on the "telecommunications service" issue, without benefit of any briefing by the parties on the issue (Cross Petition at 8; FCC App. at 115a). In other words, *no* court has addressed the merits of Cross Petitioners' "cable service" arguments, or Federal Respondents' "information service" arguments. The only difference between the Federal Respondents' position and ours is that they, unlike we, happen to like the end result of the court of appeals' application of *stare decisis* with respect to the "cable service" issue, although they cannot plausibly agree with the court of appeals' reliance on *stare decisis* to reach that result.

3. Cross-respondents ignore another important reason this Court's review is warranted: The "cable service" classification issue has enormous fiscal implications for the nation's local governments that Cross Petitioners represent. Cross Petition at 24-25. Thus, contrary to NCTA's assertion (NCTA Opp. at 1 & n.1), the issues presented by the Cross Petition do indeed involve governmental or public bodies and the public interest that they represent.[9]

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[9] *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 244 (8th ed. 2002).

II. The *Declaratory Ruling*'s Rationale for Concluding that Cable Modem Service Is Not a "Cable Service" Is Erroneous.

On its face, the plain language of the "cable service" definition encompasses two elements: a downstream element in §522(6)(A) ("the one-way transmission to subscribers of ... other programming service"), and an upstream element in §522(6)(B) ("subscriber interaction, if any, ... required for the selection or use of such ... other programming service"). Like the *Declaratory Ruling* and *Portland*, cross-respondents dwell on the downstream element -- specifically, "one-way transmission" and "other programming service" -- and essentially ignore the upstream element, in the apparent hope it will go away.[10] But even cross respondents' "one-way transmission" and "other programming service" arguments do not withstand reasoned analysis.

1. Assuming *arguendo* that "one-way transmission" in §522(6)(A) means that a cable operator must possess editorial control over content,[11] cross-respondents cannot come to grips

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[10] They do point to the phrase, "if any," in §522(6)(B) for the unremarkable proposition that the upstream element of "cable service" is not "a necessary component" of "cable service." FCC Opp. at 5-6; Earthlink Opp. at 4. But the upstream component is equally clearly a permissible, and thus non-disqualifying, element of "cable service." Cross-respondents' interpretation of "cable service," in contrast, would essentially render that upstream component inoperative.

[11] Even this conclusion requires considerable semantic gymnastics. As used in the Communication Act's definition of "telecommunications," 47 U.S.C. §153(43) (and thus derivatively in its definition of "telecommunication service," 47 U.S.C.

with the fact that the Commission itself has concluded that cable operators do in fact possess such control over cable modem service content. Cross-Petition at 21-22 & n.13. To suggest that operators' editorial decisions not to exploit that control more fully proves the absence of such control is sheer sophistry.

Furthermore, the Commission's conclusion that cable modem service is a non-cable service in its entirety cannot be squared with its concession that cable operators do in fact include in cable modem service "proprietary information or packages of pre-selected web site links" (FCC Opp at 4) and that "discrete parts of cable modem service have characteristics of cable service" (*id.*). Even in the original 1984 "cable service" definition, before its expansion in 1996, Congress unequivocally instructed that if a cable service and a non-cable service are combined in a single offering, that combination does "not transform ... the cable service [component of the offering] into a non-cable service."[12]

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§153(46)), "transmission" connotes the *absence* of editorial control, and the *Declaratory Ruling* under review repeatedly uses the term "transmission" in that way. *See, e.g.*, FCC App. at 96a-98a, 100a & n.195, & 108a. Moreover, "telecommunications service" can be a one-way service -- indeed, even a one-way video service. *See, e.g.*, 47 U.S.C. §571(a)(2). While *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), concluded that "one-way transmission" in §522(6)(A) could be read to connote editorial control, its reasoning is a bit peculiar: While a letter-writer may "send" a letter, 33 F.3d at 71, she does not "transmit" a letter; the Postal Service does.

[12] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681 ("*1984 House Report*").

2. Cross-respondents' claim (FCC Opp. at 5; Earthlink Opp. at 4-5) that cable modem service is not "other programming service" within the meaning of 47 U.S.C. §522(14) likewise misses the mark. The plain and broad language of the "other programming service" definition is clearly subsumed within the "information service" definition,[13] the very same definition that Federal Respondents claim in their petition encompasses cable modem service. And there can be no serious dispute that cable modem service makes available to all subscribers generally "the majority of the information accessed over the Internet" (FCC Opp. at 4), from websites such as CNN.com and ESPN.com to a myriad of other websites that, much like traditional video channels, any subscriber may visit if she chooses.

Cross-respondents' only rejoinder is to point to more personalized "on-line banking information and personal e-mails" (FCC Opp. at 12). But even assuming *arguendo* that these particular applications do not fall within the "cable service" definition, treating them as disqualifying the websurfing bulk of cable modem service from "cable service" would improperly allow the tail to wag the dog. *See* text at note 12 *supra*. Even the Commission has recognized that e-mail is not the *sine qua non* of cable modem service (FCC App. at 95a & n.177).

More fundamentally, cross-respondents overlook the effect of Congress' 1996 expansion of the §522(6)(B)

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[13] *Compare* 47 U.S.C. §522(14) ("*information* that a cable operator makes available to all subscribers generally") *with* 47 U.S.C. §153(20) ("information service" means "the offering of a capability for ... making available *information* via telecommunications") (emphasis added).

upstream component of the "cable service" definition to include "subscriber interaction ... required for the ... *use* of ... other programming service." While it may be true that, prior to this 1996 expansion, such subscriber-specific uses of information accessed from the Internet would disqualify a service from being a "cable service," there is nothing in the plain language of "use" that suggests it does not include subscriber-specific "use," and much that suggests otherwise. *See* Cross Petition at 17-22.

3. Respondent Earthlink (Opp. at 6-7) inadvertently lends further support to Cross Petitioners' position when it correctly quotes the *Declaratory Ruling* as stating that "[t]he legislative history indicates that Congress intended the cable service definition 'to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under [47 U.S.C. §541(c)] and all other communications services that could be provided over a cable system.'"[14] This, of course, means that if, as Federal Respondents contend in their petition, cable modem service is an "information service" and contains no separate "telecommunications service" component, then it falls on the "cable service" side of the boundary that Congress intended the "cable service" definition to draw. It is for this reason that cross-respondents' reliance on *NCTA v. FCC* is misplaced, because there the D.C. Circuit held that video dialtone service was not a "cable service" because it was a form of "video common carriage." 33 F.3d at 70-71. Federal Respondents certainly do not argue here that cable modem service is such a common carrier telecommunications service.

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[14] FCC App. at 120a (quoting *1984 House Report* at 41, 1984 U.S.C.C.A.N. at 4678).

4. In the end, cross-respondents have no reasoned explanation for the clear and unequivocal Congressional intent expressed in the *1996 Conference Report*,[15] the *1984 House Report*, the reference to "information service" in 47 U.S.C. §544(b), or the language in the Internet Tax Freedom Act, other than to urge that these indicia be disregarded. Under *Chevron*, however, these are the very kinds of "devices of judicial construction" that cannot be ignored in construing a statute. *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 124 S.Ct. 1236, 1248 (2004). And the only way to read these various devices together "into a harmonious whole," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), is to conclude that cable modem service is a "cable service."

Respectfully submitted,

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[15] H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. 169 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 182 ("*1996 Conference Report*").